ORIGINAL

Nos. 90-8126 and 90-8184

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

LEON EARLY, PETITIONER

v.

UNITED STATES OF AMERICA

BILLY WAYNE COLEMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district courts erred in imposing a two-level increase in petitioners' offense levels for obstruction of justice under the version of Sentencing Guidelines § 3C1.1 that was in effect before November 1990.

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OPINIONS BELOW

The opinion of the court of appeals in No. 90-8126 (Pet. App. 1-5) is not reported, but the decision is noted at 927 F.2d 605 (Table). The opinion of the court of appeals in No. 90-8184 (Pet. App. 1-12) also is not reported, but the decision is noted at 928 F.2d 1133 (Table).

JURISDICTION

The judgment of the court of appeals in No. 90-8126 was entered on February 27, 1991. A petition for rehearing was denied on April 12, 1991. 90-8126 Pet. App. 6. The petition for a writ of certiorari was filed on May 24, 1991. The judgment of the court of appeals in No. 90-8184 was entered on March 21, 1991. The petition for a writ of certiorari was filed on May 30, 1991. In both cases, the jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. No. 90-8126. After a jury trial in the United States District Court for the Western District of Tennessee, petitioner Early was convicted of possessing cocaine base with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). He was sentenced to 110 months' imprisonment, to be followed by a four-year term of supervised release. The court of appeals affirmed. 90-8126 Pet. App. 1-5.

The evidence at Early's trial showed that on January 14, 1989, Memphis, Tennessee, police officers responded to a report that a drug sale was in progress at an apartment complex. Upon reaching the scene, an officer saw Early and two other men standing on a second-story balcony. The officer saw Early hand something to one of the other men, who then handed money to the third man. When Early saw the officers approach, he threw a plastic ziplock bag over the balcony and onto the ground below. After Early was arrested, one of the officers retrieved the bag and discovered that

it contained crack cocaine. 90-8126 Pet. App. 1-2; Gov't C.A. Br. 2-3.

At his sentencing on December 8, 1989, Early argued that his conduct in throwing away the cocaine as the officers approached did not constitute an attempt to obstruct justice under the then-applicable version of Sentencing Guidelines § 3C1.1. At the time of Early's offense and sentencing, Section 3C1.1 provided (Sentencing Guidelines § 3C1.1 (1989)):

> If the defendant willfully impeded or obstructed, or attempted to impede or obstruct, the administration of justice during the investigation or prosecution of the instant offense, increase the offense level by 2 levels.[1/]

The commentary to Section 3C1.1 stated at that time that Section 3C1.1

> provides a sentence enhancement for a defendant who engages in conduct calculated to mislead or deceive authorities * * * or otherwise to willfully interfere with the disposition of criminal charges, in respect to the instant offense.

Sentencing Guidelines § 3C1.1, Commentary (1989). In addition, one of the application notes to Section 3C1.1 provided that "destroying or concealing material evidence, or attempting to do so" may provide a basis for applying the Section 3C1.1 adjustment. Sentencing Guidelines § 3C1.1, Application Note 1(a) (1989).

[1/] Effective November 1, 1990, Section 3C1.1 was amended to provide:

> If the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the investigation, prosecution, or sentencing of the instant offense, increase the offense level by 2 levels.

See Sentencing Guidelines App. C, amend. 347, at C.189 (1990).

Relying on those provisions, the district court imposed a two-level increase for obstruction of justice. 90-8126 C.A. App. 153-154.

The court of appeals affirmed. 90-8126 Pet. App. 1-5. The court rejected Early's contention that his act of throwing away the cocaine was not willful but rather was like spontaneous flight, which some courts have held does not constitute obstruction of justice. The court concluded that "under some circumstances, the act of throwing evidence can amount to a willful attempt to conceal the evidence," while "[u]nder other circumstances, it might not." Id. at 3. Here, the court observed, Early did more than "merely drop the bag at his feet." Ibid.

The court of appeals noted that the district court's finding that Early's actions constituted a willful attempt to conceal evidence is subject to reversal on appeal only if it was clearly erroneous. Under the evidence before the district court, the court of appeals concluded, "it was not error for the district judge to conclude that the defendant threw the bag of cocaine from the balcony in a calculated and willful attempt to conceal it from the police." 90-8126 Pet. App. 4.

After the court of appeals rendered its decision, Early filed a petition for rehearing contending for the first time that under a November 1990 amendment to the application notes to Section 3C1.1, his conduct would not constitute obstruction of justice within the meaning of Sentencing Guidelines § 3C1.1. See 90-8126 Pet. 5-6. The amendment -- which took effect in November 1990,

after petitioner was sentenced -- states that the enhancement generally applies to

> destroying or concealing * * * evidence that is material to an official investigation or judicial proceeding * * *, or attempting to do so; however, if such conduct occurred contemporaneously with arrest (e.g., attempting to swallow or throw away a controlled substance), it shall not, standing alone, be sufficient to warrant an adjustment for obstruction unless it resulted in a material hindrance to the official investigation or prosecution of the instant offense or the sentencing of the offender.

Sentencing Guidelines § 3C1.1, Application Note 3(d) (1990). The court of appeals denied the petition for rehearing. 90-8126 Pet. App. 6.

2. No. 90-8184. After a jury trial in the United States District Court for the Western District of Tennessee, petitioner Coleman was convicted on one count of possessing cocaine base with intent to distribute it and one count of possessing cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). He was sentenced to 78 months' imprisonment, to be followed by a four-year term of supervised release. The court of appeals affirmed. 90-8184 Pet. App. 1-12.

On November 22, 1989, Memphis police officers made a controlled purchase of cocaine from Coleman through an informant. The officers then telephoned Coleman's motel room and told him that the police were on their way to his room. Coleman and a woman companion fled the room, got into a car, and led the police on a high-speed chase. During the chase, a yellow bag was thrown out the window of Coleman's car. After Coleman was stopped and arrested, the police retrieved the yellow bag, which contained

cocaine. Coleman acknowledged responsibility for the bag. 90-8184 Pet. App. 2-3; Gov't C.A. Br. 3-5.

At Coleman's sentencing in July 1990, the district court imposed a two-level increase under Sentencing Guidelines § 3C1.1 because Coleman threw the bag of drugs from the car or caused it to be thrown. The court noted that while flight alone is not enough to warrant an enhancement for obstruction of justice, the enhancement was appropriate in this case because Coleman fled by driving his car at a high rate of speed and attempted to dispose of the drugs during the high-speed chase. 90-8184 Pet. App. 4-5.

On appeal, Coleman renewed his contention that throwing the drugs from the car did not constitute obstruction of justice under Section 3C1.1. He relied on the November 1990 amendment to the application notes to Section 3C1.1, even though that amendment was not in effect at the time of his offense or his sentencing.[2/]

The court of appeals affirmed. 90-8184 Pet. App. 1-12. The court noted that "[t]his case involves more than flight alone; it involves an attempt to dispose of drugs during the context of a high-speed chase." Id. at 11. For that reason, the court concluded, Coleman's conduct might well qualify for a two-point obstruction of justice enhancement even under the November 1990 version of Section 3C1.1 and its commentary. Ibid. (citing United States v. Hagan, 913 F.2d 1278 (7th Cir. 1990)). In any event, the

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[2/] Coleman also argued that there was insufficient evidence to show that he threw the bag or ordered it to be thrown. The court of appeals rejected that contention, 90-8184 Pet. App. 9-10, and Coleman does not renew it here.

court held that under the version of Section 3B1.1 and its commentary that were in effect at the time Coleman was sentenced, his "attempt to dispose of his drugs (by his own actions or by directing another) in combination with the high-speed chase was sufficient to invoke the enhancement." 90-8184 Pet. App. 11.

ARGUMENT

Petitioners acknowledge (90-8126 Pet. 6; 90-8184 Pet. 6-7) that the pre-1990 version of the commentary to Section 3C1.1, which was in effect at the time they committed their offenses and were sentenced, provided that a two-point enhancement was appropriate whenever a defendant "destroy[ed] or conceal[ed] material evidence * * * or attempt[ed] to do sc." Petitioners do not dispute that that language plainly covers cases in which a suspect attempts to conceal or destroy evidence at the time of his arrest. Petitioners contend, however (90-8126 Pet. 6-10; 90-8184 Pet. 6-11), that in light of the subsequent revision of the commentary to Section 3C1.1 in November 1990, their conduct cannot be regarded as obstruction of justice within the meaning of Section 3C1.1, and that their sentences were therefore unlawful.

1. The courts of appeals are in agreement that, although sentencing courts are not bound by amendments to the commentary to the Sentencing Guidelines that have not taken effect at the time of the offense, the courts may consider such amendments if they reflect the Commission's view of what a particular pre-amendment Guideline was intended to mean. Some courts have extended that principle to permit appellate courts to give weight to clarifying

amendments that took effect only after the date of sentencing. See, e.g., United States v. Fiala, 929 F.2d 285, 290 (7th Cir. 1991); United States v. Nissen, 928 F.2d 690, 694-695 (5th Cir. 1991); United States v. Perdomo, 927 F.2d 111, 117 (2d Cir. 1991).

That principle applies, however, only if the change in the commentary simply "clarif[ies] a meaning that was fairly to be drawn from the original version." United States v. Guerrero, 863 F.2d 245, 250 (2d Cir. 1988). Where the effect of a change made by the Commission is to alter the meaning that would naturally be given to the version of the Guidelines in force at the time of sentencing, it is neither necessary nor appropriate to treat the later version as controlling. See 18 U.S.C. 3553(a)(4) (defendants are to be sentenced according to Guidelines in effect at the time of sentencing). If the rule were otherwise, a judgment that was correct at the time it was entered could be upset on appeal as a result of a change in the Guidelines that had not been adopted or even proposed at the time of sentencing. The purpose of the rule permitting courts to seek guidance from later pronouncements of the Sentencing Commission is to ensure that the sentencing court correctly applies the Guidelines in effect at the time; the rule is not designed to authorize a reviewing court to alter a sentence that was correct at the time it was imposed, simply because the Guidelines were revised at some later time in a manner favorable to the defendant.[3/]

[3/] There are specific provisions for reducing a defendant's term of imprisonment where the Guideline range applicable to the (continued...)

Under the version of Section 3C1.1 and its commentary in effect at the time petitioners were sentenced, it was reasonably clear that an attempt to conceal or destroy evidence during an investigation would justify a two-point enhancement for obstruction of justice. Section 3C1.1 referred to willful efforts to obstruct justice during an investigation, the accompanying commentary provided that the conduct had to be "calculated to mislead or deceive authorities," and Application Note 1(a) in the commentary provided that the adjustment could be applied for the conduct of "destroying or concealing material evidence, or attempting to do so." Sentencing Guidelines § 3C1.1, Commentary & Application Note 1(a) (1989). As the courts of appeals that have addressed the issue have uniformly held, that description clearly fits the scenario of a defendant who seeks to conceal or dispose of evidence at the time of an encounter with the police. See United States v. Dortch, 923 F.2d 629, 632 (8th Cir. 1991); United States v. Baker, 907 F.2d 53, 55 (8th Cir. 1990); United States v. Cain, 881 F.2d 980, 982 (11th Cir. 1989); United States v. Galvan-Garcia, 872 F.2d 638, 641 (5th Cir.), cert. denied, 110 S. Ct. 164 (1989).

The November 1990 revision to the commentary to Section 3C1.1, and in particular the new Application Note 3(d), changed the rule with respect to attempts to destroy or conceal evidence at the time of arrest. The new application note stated that conduct such as

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[3/](...continued)
defendant has been lowered as a result of an amendment to the Guidelines, where such a reduction is consistent with policy statements issued by the Sentencing Commission. See 18 U.S.C. 3582(c)(2); Sentencing Guidelines § 1B1.10 (1990).

"attempting to swallow or throw away a controlled substance" at the time of arrest "shall not, standing alone, be sufficient to warrant an adjustment" unless it resulted in a material hindrance to the investigation. Sentencing Guidelines § 3C1.1, Application Note 3(d) (1990). In light of the clear change in the governing rule for this kind of conduct, it is not accurate to describe Application Note 3(d) as simply clarifying "a meaning that was fairly to be drawn from the original version," United States v. Guerrero, 863 F.2d at 250. The court of appeals was therefore correct in looking to the version of Section 3C1.1 that was in effect at the time of petitioners' sentencing proceedings rather than the later-adopted version of Section 3C1.1 and its commentary.

Although petitioners assert the existence of a conflict among the circuits on this issue, no circuit has held that the November 1990 revision of Section 3C1.1 that added Application Note 3(d) to the commentary must be applied to sentencing proceedings that took place prior to the effective date of that revision. In fact, the only other court of appeals that has addressed the issue has held that the November 1990 revision to Application Note 3(d) should not be applied retroactively. See United States v. Dortch, 923 F.2d at 632 n.2. It is true that courts have relied on other parts of the November 1990 revision to Section 3C1.1 in construing the prior version of that Guideline. In the case of those other portions of the 1990 revision, however, the Commission's revision clearly had the effect of confirming an interpretation that was already apparent from the language of the prior Guideline or commentary,

rather than changing the prior rule. See United States v. Urbanek, 930 F.2d 1512 (10th Cir. 1991) (denial of guilt is not conduct that can justify an adjustment for obstruction of justice); United States v. Fiala, 929 F.2d 285, 289-290 (7th Cir. 1991) (same); United States v. Sanchez, 928 F.2d 1450, 1459 (6th Cir. 1991) (avoiding or fleeing from arrest is not obstruction of justice for purposes of Sentencing Guidelines § 3C1.1); United States v. Paige, 923 F.2d 112, 114 (8th Cir. 1991) (same).[1/]

2. In light of these principles, neither petitioner is entitled to relief. Both were found to have intentionally sought to conceal or destroy evidence for the purpose of misleading or deceiving law enforcement authorities during the course of an investigation. Their conduct therefore fell squarely within the reach of the version of Sentencing Guidelines § 3C1.1 that was in effect at the time of their offenses and sentencing proceedings. And in light of the clear change in the rule effected by the November 1990 revision, there is no justification for overriding

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[1/] As petitioners note, the Sentencing Commission stated that its amendment to Section 3C1.1 and the accompanying commentary "clarifies the operation of § 3C1.1." Sentencing Guidelines App. C, amend. 347, at C.189 (1990). The use of the term "clarifies" with respect to the entire detailed revision of Section 3C1.1 does not justify the conclusion that every part of the revision is simply an explicit statement of what was already implicit in the prior language. As we have indicated above, several parts of the November 1990 revision may have that character, but the particular change at issue in this case -- Application Note 3(d) -- did not.

Other cases cited by petitioners deal with different Guidelines altogether and therefore have nothing at all to say about whether the 1990 revision of Section 3C1.1 effected a change in the rule to be applied under that Guideline or was merely a confirmation of a rule that was implicit in the prior version.

the statutory provision that requires defendants to be sentenced pursuant to the version of the Guidelines that is in effect at the time of sentencing. 18 U.S.C. 3553(a)(4).

In addition, special factors make each petitioner's case an unsuitable one for applying the subsequent version of the Guidelines and overturning the district court's Section 3C1.1 enhancement. In petitioner Early's case, his counsel did not argue the applicability of the November 1990 version of Sentencing Guidelines § 3C1.1 at any time before the petition for rehearing, even though the court of appeals did not decide the case until almost four months after the November 1990 version of the Guidelines became effective. Early's failure to raise his present argument before the court of appeals on a timely basis counsels against granting review. Although his default is not jurisdictional, as it would be in a case coming from a state court, see Herndon v. Georgia, 295 U.S. 441, 443 (1935), the absence of a pre-dispositional presentation of the argument raises the question whether the panel would have analyzed the case in the same way if the issue had been properly raised. What is more, because the decisions in both Early's and Coleman's cases are unpublished, those decisions have little if any precedential weight even within the Sixth Circuit. See 6th Cir. R. 24 (citation of unpublished decisions disfavored, except to establish res judicata, estoppel, or law of the case).

In petitioner Coleman's case, moreover, the conduct at issue was more than simple concealment or destruction of evidence. As the court of appeals stated, Coleman attempted to dispose of his

drugs during a high-speed chase, which had the potential of endangering others. 90-8184 Pet. App. 11. For that reason, as the court of appeals noted, Coleman's conduct would likely have constituted obstruction of justice even under the amended commentary to Section 3C1.1. See United States v. Paige, 923 F.2d 112, 114 (8th Cir. 1991) (a car chase to avoid arrest, in which individuals were endangered and evidence thrown out the window, constituted willful obstruction even under the November 1990 version of Section 3C1.1). Coleman's case would therefore not be an appropriate one in which to review the question that petitioner seeks to present, i.e., whether the simple act of disposing of drugs at the time of arrest was subject to a two-point enhancement under the pre-November 1990 version of Sentencing Guidelines § 3C1.1.[2/]

Finally, because the new version of Sentencing Guidelines § 3C1.1 is now in effect and governs all sentencing proceedings held after November 1, 1990, the question presented by the petitions is not one of continuing importance. The issue has not arisen with great frequency in the past, and it is likely to arise with even less frequency in the future, as the number of cases governed by the pre-1990 version of Section 3C1.1 decreases over

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[2/] Even in petitioner Early's case, as the court of appeals pointed out, the conduct was more aggravated than a defendant's act of simply dropping a controlled substance to dissociate himself from the evidence; Early threw the drugs off an apartment balcony and onto the ground below, not only to dissociate himself from them but, inferably, to conceal the drugs altogether from discovery by the police. See 90-8126 Pet. App. 3.

time. Further review of this issue, on which there is no conflict among the circuits, is therefore unwarranted.

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted.

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